

THE "HONEY I" EX "CASSIO"

SINGAPORE SLIPWAY & ENGINEERING CO.
(PTE.) LTD. v. THE "HONEY I" EX "CASSIO"
(OWNERS)

ROBINA CREDIT LTD. & ORS. (INTERVENERS) B

[O.C.J. (Lai Kew Chai J.) May 6, 1987]

[Singapore - Motion in Admiralty in Rem No. 679 of 1984]

Shipping - Arrest and sale of vessel by plaintiffs - Intervention by possessory lienee claiming proceeds of sale - Intervention by mortgagee of vessel for same - Question of priority of possessory lien after provision for taxed costs.

Shipping - Lien - Possessory Lien - Priority over mortgagee's claim.

There are two competing motions in these proceedings. The first one was filed by Singmarine Shipyard (Pte) Ltd. ("Singmarine"), which had intervened in the proceedings initiated by the plaintiffs ("Singapore Slipway"), which arrested the vessel "Honey I" to recover the sum of \$24,000 for repair works carried out on the vessel. At the time this motion was filed, there was in court the sum of \$518,586.00 being the balance of the proceeds of sale of the vessel. Singmarine, claiming a possessory lien on the vessel in respect of their repair bills totalling \$1,681,768.00 for which default judgment was entered, sought the balance sum of \$478,586.00, i.e., after providing for taxed costs estimated at \$40,000.00. In the other motion, Robina Credit Ltd. ("the mortgagees"), the mortgagees of the vessel, also intervened to seek payment of the proceeds of the sale. The question for decision is whether the possessory lien asserted by Singmarine takes priority over other claimants (after provision for costs) in the circumstances.

Held: (1) order in terms of the motion of Singmarine should be granted;

(2) the mortgagee's application should be dismissed with costs.

Cases referred to:

- (1) *The Immacolata Concezione* (1883) 9 P.D. 34.
- (2) *The Tergeste* [1903] P. 26.
- (3) *The Acacia* (1880) 4 Asp. M.C. 254.
- (4) *Jacobs v. Latour* (1828) 5 Bing. 130; 130 E.R. 1010.
- (5) *The Andrea Ursula* [1971] 1 Lloyd's Rep. 145.
- (6) *A v. B* [1984] 1 All E.R. 265.
- (7) *The Arantzazu Mendi* [1939] A.C. 256.
- (8) *The City of Norwich* (1886) 118 U.S. 48; 6 S.Ct. 1150.

MOTIONS.

Haridass Ajaib for the plaintiffs and Singmarine Pte. Ltd.

Cheong Yuen Hee (Joseph Yoong with him) for Robina Credit Ltd.

Ronald D'Cruz for Huttons (Plants & Spares) Ltd., the necessities men.

Cur. Adv. Vult.

A **Lai Kew Chai J.:** I have before me two motions. The first motion was filed by Singmarine Shipyard (Pte) Ltd (who I will refer to as "Singmarine") who had intervened in these proceedings initiated by the plaintiffs, Singapore Slipway & Engineering Co Pte Ltd (hereinafter referred to as "Singapore Slipway") and under which Singapore Slipway arrested the vessel "Honey I" to recover the sum of \$24,000 for repair works carried out on the vessel at Singapore between December 5, 1983, and March 1, 1984, at the request of the defendants. At the time this motion was filed there was in court the sum of \$518,586.00 being the balance of the proceeds of sale of the vessel which was appraised and sold by the High Court at the initiative of Singapore Slipway.

By the abovementioned motion, Singmarine seek from the High Court the following orders:

D "1. That the priorities of the various claimants against the balance of the proceeds of sale of the ship "HONEY I" ex "CASSIO" amounting to \$518,586.00 be determined in the following order:

(a) The abovenamed Plaintiffs' taxed costs until the date of sale of the vessel in this action.

E (b) The taxed costs of Singmarine Shipyard (Pte) Ltd and their claim in Admiralty in Rem No. 774 of 1985.

2. That a sum of \$40,000.00 estimated to cover the aforesaid taxed costs be retained pending taxation.

F 3. That there be payment out to the Interveners, Singmarine Shipyard (Pte) Ltd the balance sum of \$478,586.00 in accordance with the aforesaid order for priority.

G 4. That the costs of and incidental to this Motion be taxed and paid out of the proceeds of sale to the Interveners, Singmarine Shipyard (Pte) Ltd in priority to all other claims."

The vessel was arrested while she was in the possession of Singmarine at its shipyard in Singapore. Singmarine are interveners in this action and they claimed a possessory lien on the vessel in respect of their repair bills totalling \$1,681,768.00 for which judgment in default of appearance was entered with costs by Singmarine against the owners of the vessel in Admiralty in Rem No. 774 of 1985.

When the motion came up for hearing, the other known claimants to the proceeds of sale were Robina Credit Limited (hereinafter referred to as "the Mortgagees"), the mortgagees of the vessel who had intervened in these proceedings and Hutton (Plant and Spares) Ltd who had supplied necessities to the vessel. As will be readily appreciated, if the possessory lien asserted by Singmarine

stands up as valid, Singmarine will be entitled to receive all the proceeds of sale after the costs of Singapore Slipway are paid; there would be nothing left over for the Mortgagees or for any other party. In relation to a mortgage the possessory lien does not take the *res cum onere*; even if the mortgage was executed before the assumption of possession (which, however, was not so in this instant case where the mortgage was executed in June 1984, well after Singmarine had taken possession of the vessel): see *Thomas on Maritime Lien* paragraph 453 pp. 256 to 258, *The Immacolata Concezione*⁽¹⁾ *The Tergeste*⁽²⁾ and *The Acacia*.⁽³⁾

The first line of attack mounted by the Mortgagee was based on the assertion that Singapore Slipway and Singmarine, being sister companies and were subsidiaries of Keppel Shipyard Limited, had acted in concert and Singapore Slipway's arresting of the vessel amounted to Singmarine voluntarily giving up possession of the vessel who had thereby lost their possessory lien. In this part of their argument the Mortgagees had to concede, in the light of what was plainly stated in paragraph 75 of the *British Shipping Laws*, Volume II, Merchant Shipping Act, 7th edn., that if a repairer were forced to give up his possessory lien by a judicial process, such as the arrest, appraisal and sale of a vessel at the suit of other admiralty claimants, the court will protect his rights and will give him priority over all claims except maritime liens which had attached before the possessory lien.

However, in my view this line of attack is off the mark in several respects and it is, in my view, bound to fail. The assumption that Singapore Slipway and Singmarine had acted in concert is completely unwarranted by the evidence. That they were sister companies no less entitled them to be treated as separate and distinct legal entities. Neither company had done anything which warranted any court piercing the corporate veil. It appeared, and I was quite convinced in the course of arguments, that the two companies had deliberately taken advice and accepted the view that to prevent any allegation that Singmarine had voluntarily given up their possessory lien by arresting the vessel, or that it had accepted the statutory right of arrest for their common law lien, they carefully and quite deliberately decided that the arrest should be, as it was, effected by Singapore Slipway.

The course of action adopted by Singmarine was quite understandable in view of the state of case law: the question whether the repairer with a possessory lien can himself arrest the vessel and yet

A retain the possessory lien has not been settled. It was not decided in either *Jacobs v. Latour*⁽⁴⁾ nor was the nettle grappled with in *The Andrea Ursula*.⁽⁵⁾

B Another line of attack by the Mortgagees was based on the proposition that Singmarine had lost their possessory lien because they had, by instituting another Admiralty in Rem No 774 of 1985 against the proceeds of sale of the vessel, taken a step or a series of steps inconsistent with a possessory lien. For the Mortgagees, it was submitted that prior to the commencement of the said admiralty action Singmarine had no "admiralty lien" as mere repairers, and that their claims ranked rather poorly in the ladder of priorities, if the possessory lien was not taken into consideration.

D It was a matter of some perplexity to me that learned counsel for the Mortgagees relied on *A v. B*⁽⁶⁾ and the commentary thereon by Professor D.C. Jackson in his book, *The Enforcement of Maritime Liens*, at p. 264. Both of them, which repay careful reading, are, in my view, plainly against the Mortgagees. In *A v. B* (*supra*) solicitors who asserted a lien over the papers of shipowners, their clients, arrested the vessel to secure payment of their costs and disbursements which were incurred in litigation relating to the vessel. Leggatt J. held that what the solicitors did was merely to enforce the default judgment and not to substitute or elect to accept one security for another. What-
E ver Professor Jackson might have thought about Leggatt J.'s comment about the nature of an arrest being a "process of enforcement," what was plain was that Professor Jackson did not think that it was tenable to say in that case that the solicitors
G had abandoned their lien and accepted in substitution the statutory lien of admiralty proceedings. In footnote 22, Professor Jackson ventured the view thus: "An arrest does not imply the abandonment of other security." However, although the types of security (*viz.* between the statutory
H lien of arrest and possessory lien) involved in the instant case are different and they are rooted in different principles, one at common law and the other by statute, (and both features would be relevant to support Professor Jackson's remarks) the point has to be acknowledged that Singmarine's
I arrest here involved the same *res* as much as the possessory lien they asserted against the vessel.

A more intensive consideration in principle is therefore perhaps necessary. Learned counsel for Singmarine contended with some force when he asked robustly: By Singmarine seeking the statu-

tory aid of the court to enforce their possessory lien how could it be argued that by that very process the possessory lien is destroying the lien? Singmarine's counsel relied strongly on the Irish case of *The Acacia* (*supra*). In that case, where the possessory lien arrested the vessel as well, Townsend J. made it quite plain that he was reluctant to decide that the Admiralty arrest had destroyed the lien for the enforcement of which the arrest was effected. Learned counsel also pointed out that in *The Acacia* (*supra*) the decision of Sir Robert Phillimore, a great Admiralty Judge, in *The Sussanati Thrift* was noted. A vessel, over which the shipwright was asserting a possessory lien was arrested by the mortgagee. The shipwright proceeded against the vessel and obtained a decree whilst (as in our instant case) retaining possession. Sir Robert Phillimore held that the shipwright had a prior claim over the mortgagee.

I was also referred to *Immacolata Concezione* (*supra*) where the ship repairers with a possessory lien, who had proceeded in admiralty against the vessel, was nonetheless given priority over all other claimants except wages earned prior to possession by the ship repairers, that is, a prior maritime lien.

Learned counsel for Singmarine further laid great store in the fact that the vessel was sold without prejudice to the possessory lien. This was expressly reserved in the relevant order of court. It was also emphasised that the arrest of the vessel by the Sheriff did not pass possession to the Sheriff but merely custody. And although that custody passed to the Sheriff all possessory rights which previously existed continued to exist, including all remedies based on possession: see *The Arantzazu Mendi*⁽⁷⁾ where Lord Atkin at p. 266 said: "The ship arrested does not by the mere fact of arrest pass from the possession of its then possessors to a new possession of the Marshall. His right is not possession but custody. Any interference with his custody will be properly punished as a contempt of the court which ordered arrest, but, subject to his complete control of the custody, all the possessory rights which previously existed continue to exist, including all the remedies which are based on possession."

Finally, a passage from *Thomas on Maritime Lien* at page 258 may be quoted with profit:

"... a shipwright may possess both a possessory lien and a right to proceed in rem against a res. Should he surrender possession of the res and proceed alternatively in rem it is likely that the priority attached to the possessory lien is lost and the claim ranks solely as a statutory lien."

A In view of the cogency of the reasons advanced on behalf of Singmarine, I would make an order in terms of their motion.

B I now turn to the Mortgagees' application to set aside the order of court dated November 8, 1985, under which it was ordered that the sum of \$249,100 representing the proceeds of insurance in respect of the vessel "Honey I" relating to the damage sustained by the vessel whilst under arrest as a result of a fire did form part of the proceeds of sale of the vessel. Although the Mortgagees had appeared when the matter came up in the High Court on November 8, 1985, and had not lodged any appeal against the order made, they now say that the High Court's decision was made *per incuriam* on the basis that the insurance moneys could never in law form part of the *res*. Learned counsel quoted an American case, *The City of Norwich*⁽⁸⁾ for the comment that "the contract of insurance does not attach itself to the thing insured, nor go with it when it is transferred." However, in my view, that proposition has no application in this case. The question in that case was whether the proceeds of insurance were or constituted the amount or value of the shipowners' "interest in the vessel" for the purposes of calculating the limitation of liability of a shipowner under the relevant Shipping Act. The American case was not an insurance taken out by an Admiralty Sheriff as part of his responsibility to protect the *res* on behalf of all and every interest or claimant before a court of law exercising admiralty jurisdiction. The policy effected in this case, as in the ordinary way, was taken out in the name of "The Sheriff, Singapore and (the owners) for their respective rights and interests." Quite obviously, the Sheriff had no personal interest in the policy as such and his interest was the interest of all claimants against the vessel.

H Further, after the casualty and on being paid by underwriters, the Sheriff could have repaired the fire damage or, alternatively, he could have retained the insurance moneys holding the same as part of the *res* under a court order and sold the vessel without carrying out any repair. He adopted the latter course and had acted under an order of court binding on all parties before it. I also agree with Singmarine that it is too late in the day to unscramble the entire arrangements without prejudicing the rights of Singmarine. If I accede to the Mortgagees' application, the effect would be that the insurance proceeds would not be part of the fund for distribution by the High Court exercising its admiralty jurisdiction and conceivably the

Mortgagees would then be in a position to rely on the terms of their mortgage instrument and claim the insurance money's for themselves. This outcome is both inconsistent with the duty of the Sheriff to effect insurance on a vessel arrested upon lodgement of the commission of appraisal and sale on behalf of all parties interested in the *res* as shall be determined judicially and, in this case, is also unjust and unfair to Singmarine whose possessory lien would have been whittled down because of the casualty.

In the circumstances, I would dismiss the Mortgagees' application with costs.

Order accordingly.

Solicitors: *Haridass Ho & Partners; Tang & Co.; Rodyk & Davidson.*

ONG & COMPANY PTE. LTD. v. CARL Y. L. CHOW

[A.C.J. (Chan Sek Keong J.C.) May 28, 1987]

[Singapore – Civil Suit No. 3786 of 1986]

Practice and Procedure – Writ of Summons – Service out of jurisdiction – Non-compliance with R.S.C. 1970 – Effect of – Meaning of "may" in R.S.C. 1970, O.11 rr.5 & 6.

On June 20, 1986, the plaintiffs obtained leave to issue a Writ of Summons against the defendant and to serve notice of the said writ on him at an address in Kuala Lumpur, Malaysia. The Notice of the Writ was served on the defendant personally on July 30, 1986 by a process server employed by a firm of solicitors practising in Kuala Lumpur.

On September 2, 1986, the defendant applied to set aside the service of the Notice of the Writ for non-compliance with Order 11 rule 5 and/or Order 11 rule 6 of the Rules of the Supreme Court 1970. On January 30, 1987, the Senior Assistant Registrar made an order setting aside the said service. The plaintiff appealed against the said Order.

Held, dismissing the appeal: (1) rule 5(1) does not expressly say that such personal service may be effected by a private arrangement between the plaintiff and his agent in the country where service is to be effected;

(2) the service of a writ is an exercise in judicial power. The judicial power of a State can only be exercised within

A the territorial limits of the State over which the courts have jurisdiction;

(3) rule 6(2) of Order 11 of the 1970 Rules provides for service (a) through the government of that country where that government is willing to effect service; or (b) through a Singapore consular authority in that country, except where service through such an authority is contrary to the law of that country;

(4) the expression "may" as used in Order 11 rule 5(8) and rule 6(2) connotes permission and not discretion. Without these rules, service of process outside the jurisdiction would not be possible;

(5) by effecting services of the Notice of the Writ without complying with rule 5(8) or rule 6(2) of Order 11, the plaintiff had in fact disregarded the legal basis upon which the judicial power in Singapore may be exercised in Malaysia. That must render the purported service a nullity.

Cases referred to:

- D (1) *Re Busfield* (1886) 32 Ch. D. 123.
(2) *Afro Continental Nigeria Ltd. v. Meridian Shipping Co. S.A. (The "Vrontados")* [1982] 2 Lloyd's Rep. 241.

APPEAL FROM REGISTRAR.

E *Yap Shao Sin* for the plaintiffs/appellants.

Goh Kok Leong for the defendant/respondent.

Cur. Adv. Vult.

F **Chan Sek Keong J.C.:** On June 20, 1986, the plaintiffs obtained leave to issue a Writ of Summons against the defendant and to serve notice of the said writ on him at an address in Kuala Lumpur, Malaysia. The Notice of the Writ was served on the defendant personally on July 30, 1986, by a process server employed by a firm of solicitors practising in Kuala Lumpur. According to an affidavit filed by an advocate and solicitor practising in Kuala Lumpur, this method of service was permitted by the rules of the procedure applicable in Malaysia.

H On September 2, 1986, the defendant applied to set aside the service of the Notice of the Writ for non-compliance with Order 11 rule 5 and/or Order 11 rule 6 of the Rules of the Supreme Court 1970 ("the 1970 Rules"). On January 30, 1987, the Senior Assistant Registrar made an order setting aside the said service. The plaintiff has now appealed against this order.

The plaintiffs' contention is that Order 11 Rule 5(1) and (2) of the 1970 Rules permit them to effect service in the manner they have done which was in accordance with the law of Malaysia. The